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March 31, 1992

VIA FAX

Mr. Harry T. Daw
CERCLA Removal Enforcement
Section (3HW33)
U.S. Environmental Protection
Agency, Region III
841 Chestnut Building, 6th Floor
Philadelphia, PA 19107

Re: NVF Company, Kennett Square, PA

Dear Mr. Daw:

This will respond to your letter of February 6, 1992 to NVF Company enclosing a proposed Administrative Order by Consent for Removal Action relating to certain conditions on property in the vicinity of NVF's Kennett Square plant.

NVF is willing to undertake additional removal actions relating to the drainage ditch, and to the swale and tributary, pursuant to an ACO but believes the cleanup standard contained in the proposed ACO, requiring treatment and excavation of PCB soils in the drainage ditch to background (Order Standard),¹ is invalid and unreasonable. Remcor, NVF's consultant, has advised us that treatment and excavation of PCB contaminated soils will cost about \$1.5 to \$2 million. NVF's current financial condition will not permit such a commitment, and such a requirement could very well cause the closure of the Kennett Square plant with a loss of more than 300 jobs.

Furthermore, such a cleanup standard is neither required by law, nor necessary to protect human health or safety, or the environment. We have reviewed DER's letter of February 21, 1990

¹ Paragraph 8.3(d)(3) of the proposed ACO requires evaluation and implementation of "treatment and excavation alternatives for reducing the toxicity, mobility and volume of PCBs at the [drainage ditch] to a level, which provides protection to human health, welfare and the environment equivalent to background contamination levels."

AR100847

which you identified as the basis for the Order Standard, and we believe that the Order Standard does not appear in any of the authorities identified by DER and therefore is not a "promulgated" standard available for use as an applicable or relevant and appropriate requirement (ARAR). Moreover, even if the Order Standard were an ARAR, NVF believes compliance would not be practicable for this removal action under relevant factors including the urgency of the situation and the scope of the removal action. The proposed standard, as you know, has delayed, and will further delay, response, and will exceed the order goals.

Even if EPA concludes that the Order Standard is an ARAR and is practicable, NVF believes that this removal action presents an appropriate case for waiver of such standard. The regulations at 40 CFR § 300.415(i) list several grounds for waiving state ARARs for removal actions:

An alternative that does not meet an ARAR under . . . state environmental . . . laws may be selected under the following circumstances:

(1) The alternative is an interim measure and will become part of a total remedial action that will attain the applicable or relevant and appropriate federal or state requirement;

(2) Compliance with the requirement will result in greater risk to human health and the environment than other alternatives;

(3) Compliance with the requirement is technically impracticable from an engineering perspective;

(4) The alternative will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, or limitation through use of another method or approach;

(5) With respect to a state requirement, the state has not consistently applied, or demonstrated the intention to consistently apply, the promulgated requirement in similar circumstances at other remedial actions within the state

AR100848

REED SMITH SHAW & McCLAY

Mr. Harry T. Daw

-3-

March 31, 1992

NVF believes that the Order Standard, with an estimated cost of \$1.5 to \$2 million, is so "inordinately costly" that it meets the third waiver ground, impracticability from an engineering perspective, which includes:

engineering feasibility and reliability, with cost generally not a major factor unless compliance would be inordinately costly.

55 Fed. Reg. at 8748.

NVF also believes there are alternatives, including its capping proposal which you have advised is unacceptable, which can attain an equivalent standard of performance in terms of risk, thus meeting the fourth waiver ground.

Also, NVF believes that the background standard has not been consistently applied to PCB contamination sites by DER, and should therefore be waived by EPA for this removal action under the fifth waiver ground.

We also call your attention to DER's admission that technical and/or financial infeasibility is relevant to selection of an appropriate cleanup alternative. DER's letter of February 21, 1990, states at page 3 that:

If, however, the responsible person can demonstrate to the satisfaction of the Department that it is technically or financially infeasible to cleanup to background levels, or would cause more environmental harm than good, the Department may accept a plan that maximizes the amount of cleanup consistent with what is feasible. While the Department may accept such a plan, and allow a cleanup to proceed, the liability standard of background remains with the responsible party. Furthermore, in this case, it is our position that cleanup to background, or a level approaching background, is feasible at the NVF site.

NVF requests an opportunity to meet with you and DER to discuss the foregoing, including the inordinate cost of the Order Standard, and NVF's financial condition which will preclude it from carrying out the specified Order Standard. NVF will be prepared to discuss alternative removal actions, including its

AR100849

REED SMITH SHAW & MCCLAY

Mr. Harry T. Daw

-4-

March 31, 1992

original proposal, but NVF must emphasize that it is neither required by law nor financially able to perform the Order Standard for the ditch. There are additional reasons the proposed consent order is invalid and inapplicable, and NVF reserves the right to raise them in the event you issue a unilateral order.

With respect to the swale and tributary, NVF is willing to evaluate engineering controls as described in the proposed order, and to select and install reasonable controls to control sediment migration. NVF has concerns about scheduling, access and permitting issues which we would like to discuss with you. NVF is not willing, however, to agree to install any controls EPA specifies regardless of relevant considerations including, but not limited to, cost, cost-effectiveness, risk, consistency with the NCP and other relevant factors. The proposed consent order, however, contains an unqualified requirement to comply with any EPA demand.

NVF has concerns about other provisions of the proposed consent order including, but not limited to, stipulated penalties, time limits for performing the work required, open-ended obligations to "perform response actions in addition to those required by this consent order," inaccurate and misleading findings of fact, and express waivers of legal rights.

We request a meeting with you and DER during the week of April 6, except for the 10th. We are also available the following week. As you know, NVF to date has spent in excess of \$500,000 in correcting PCB contamination on its property and in the drainage ditch, and the swale and tributary; and has fully complied with every consent order and unilateral order issued by EPA. NVF is willing to attempt to reach agreement on further work, provided the concerns we have raised above can be addressed.

Finally, NVF requests that this letter be made part of the administrative record of any order ultimately issued.

Very truly yours,

REED SMITH SHAW & MCCLAY

By

Harley N. Trice II

HNTII:gdo

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